State of Rhode Island and Providence Plantations

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Peter F. Kilmartin, Attorney General

VIA EMAIL ONLY

June 12, 2015
PR 15-35

Ms. Linda Lotridge Levin

Re: Access/Rhode Island v. Office of Auditor General

Dear Ms. Levin:

The investigation into your Access to Public Records Act ("APRA") complaint filed on behalf of Access/Rhode Island against the Office of Auditor General (sometimes "Office") is complete. You allege the Office of Auditor General violated the APRA when it:

1. failed to provide certification that it had received APRA training pursuant to R.I. Gen. Laws § 38-2-3.16;
2. failed to timely respond to MuckRock's APRA request for written procedures, see R.I. Gen. Laws § 38-2-3(e); and
3. failed to maintain APRA procedures/failed to post APRA procedures on its website, see R.I. Gen. Laws § 38-2-3(d).

In response to your complaint, this Department received a substantive response dated January 5, 2015 from Auditor General Dennis E. Hoyle, and a substantive response dated January 15, 2015 from legal counsel to the Office of Auditor General, Paul D. Ragosta, Esquire. Both responses acknowledge that the Office of Auditor General violated the APRA in the manner set forth in your complaint, yet the Office characterizes these violations as "inadvertent[] and unintentional[,]" and references what the Office describes as an "unblemished" record. While the Office of Auditor General acknowledges these APRA violations, the Office represents that as of September 2014, it had submitted APRA certifications evidencing training, responded to MuckRock's APRA request, created APRA procedures, and posted these newly created APRA procedures on its website. The Office also raises whether Access/Rhode Island has standing to file this complaint.[1]

[1] With respect to the arguments that Access/Rhode Island lacks standing to file the instant complaint, we previously addressed this issue in a related complaint and our conclusion is equally applicable to this case. See Access/Rhode Island v. West Warwick School

At the outset, we observe that in examining whether an APRA violation has occurred, we are mindful that our mandate is not to substitute this Department's independent judgment concerning whether a violation has occurred, but instead, to interpret and enforce the APRA as the General Assembly has written this law and as the Rhode Island Supreme Court has interpreted its provisions. Furthermore, our statutory mandate is limited to determining whether the Office violated the APRA. See R.I. Gen. Laws § 38-2-8. In other words, we do not write on a blank slate.

The APRA provides that "[e]ach public body shall establish written procedures regarding access to public records[.]" R.I. Gen. Laws § 38-2-3(d). Effective September 2012, "a copy of these procedures shall be posted on the public body's website if such a website is maintained and be made otherwise readily available to the public." Id. In addition, R.I. Gen. Laws § 38-2-3.16, which also became effective September 2012, provides that:

> "[n]ot later than January 1, 2013, and annually thereafter, the chief administrator of each agency and each public body shall state in writing to the attorney general that all officers and employees who have the authority to grant or deny persons or entities access to records under this chapter have been provided orientation and training regarding this chapter."

With respect to these matters, the Office of Auditor General readily acknowledges that it "fail[ed] to comply with the mandates of Rhode Island General Law[s] § 38-2.3.16 in a timely manner." Moreover, the Office acknowledges that at the time MuckRock made its APRA request for a copy of its written APRA procedures, the Office of Auditor General did not maintain written APRA procedures, nor did it post its non-existent APRA procedures on its website.

The Office of Auditor General also acknowledges that it failed to timely respond to MuckRock's APRA request. Although acknowledged, this violation merits additional discussion. The APRA provides that:

> "[a] public body receiving a request shall permit the inspection or copying within ten (10) business days after receiving a request. If the inspection or copying is not permitted within ten (10) business days, the public body shall forthwith explain in writing the need for additional time to comply with the request. Any such explanation must be particularized to the specific request made. In such cases the public body may have up to an additional twenty (20) business days to comply with the request if it can demonstrate that the voluminous nature of the request, the number of requests for records pending, or the difficulty in searching for and retrieving or copying the requested records, is such that additional time is

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Department, PR 15-24. As such, we review this complaint solely on the basis of this Department's independent statutory authority. R.I. Gen. Laws § 38-2-8(d).

> necessary to avoid imposing an undue burden on the public body." R.I. Gen. Laws § 38-2-3(e). See also R.I. Gen. Laws § 38-2-7.

By e-mail dated March 31, 2014, MuckRock made an APRA request to the Office of the Auditor General seeking "[w]ritten procedures for access to the agency's public records, including any records request forms required or suggested by the agency." After not receiving a response within the statutory ten (10) business day period, MuckRock sent follow-up e-mails to the Auditor General. These follow-up emails were dated: April 15, 2014, April 30, 2014, May 15, 2014, May 20, 2014, June 1, 2014, and June 6, 2014. None of these e-mails generated any response from the Office of Auditor General.[2] Notwithstanding the fact that more than thirty (30) business days had elapsed since MuckRock's March 31, 2014 APRA request with no response from the Office, MuckRock sent additional follow-up e-mail correspondences dated: June 23, 2014, June 27, 2014, July 3, 2014, July 7, 2014, July 22, 2014, July 31, 2014, and August 15, 2014. Based upon the evidence presented it was only after the August 15, 2014 follow-up that the Office of Auditor General responded to MuckRock's APRA request, indicating that it was reviewing its APRA procedures to ensure compliance with the APRA and that "[u]pon completion of our review we will include those procedures and the designated contact person on our website." Subsequently, additional follow-up email correspondences were sent by MuckRock to the Office on August 16, 2014, August 18, 2014, September 2, 2014, and September 17, 2014, with the Office apparently supplying the newly promulgated APRA procedures on September 18, 2014. This series of events and non-responses so obviously violates the APRA that no further discussion is required to conclude that the Office of Auditor General failed to timely comply with MuckRock's March 31, 2014 APRA request. See R.I. Gen. Laws § 38-2-3(e).

Upon a finding of an APRA violation, the Attorney General may file a complaint in Superior Court on behalf of the Complainant, requesting "injunctive or declaratory relief." See R.I. Gen. Laws § 38-2-8(b). In this case, for the reasons discussed in West Warwick School Department, PR 15-24, we have reviewed this matter pursuant to the Attorney General's independent statutory authority, and accordingly, any complaint or other action must be initiated on behalf of the public interest and not the Complainant. A court "shall impose a civil fine not exceeding two thousand dollars ($2,000) against a public body found to have committed a knowing and willful violation of this chapter, and a civil fine not to exceed one thousand dollars ($1,000) against a public body found to have recklessly violated this chapter***." See R.I. Gen. Laws § 38-2-9(d).

In this case, we find injunctive relief is not appropriate. In particular, the documents requested as part of MuckRock's March 31, 2014 APRA request have been provided, so in this respect, injunctive relief would not be appropriate. Additionally, the record

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[2] There is some suggestion that the June 6, 2014 e-mail may have been blocked by a firewall or otherwise not received by the Office of Auditor General, but this is the only e-mail that the evidence suggests was not received and considering the events discussed above, its receipt or non-receipt is immaterial.

reveals that the Office has submitted an APRA certification form, promulgated APRA procedures, and posted these procedures on its website. Thus, injunctive relief is also inappropriate for this aspect of your complaint.

Despite the foregoing, we deem it appropriate to require additional information in pursuit of this Department's independent statutory authority. See R.I. Gen. Laws § 38-2-8(d). Specifically, our concern centers on the Office's failure to respond to MuckRock's March 31, 2014 APRA request in a timely manner. Frankly, considering the series of events and non-responses described above, it is difficult for this Department to understand the Office's lack of any response to MuckRock's March 31, 2014 APRA request until August 15, 2014 at the earliest, and the Office provides no insight concerning the non-responses and subsequent violation. In fairness (and completeness) the Office does cite its 'unblemished' record regarding APRA and the evidence does suggest that the Office timely complied with another APRA request from MuckRock during the same timeframe, but these considerations can be considered both aggravating and mitigating factors.

Consistent with this Department's practice and pursuant to this Department's independent statutory authority granted pursuant to R.I. Gen. Laws § 38-2-8(d), the Office shall have ten (10) business days from receipt of this finding to provide us with a supplemental explanation as to why its failure to timely respond to the March 31, 2014 APRA request should not be considered a knowing and willful violation, or reckless, in light of the APRA, Supreme Court case law,[3] and this Department's precedent. Such a determination

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[3] The Rhode Island Supreme Court examined the 'knowing and willful' standard in Carmody v. Rhode Island Conflict of Interest Comm'n, 509 A.2d 453 (R.I. 1986). In Carmody, the Court determined that:

> 'the requirement that an act be 'knowingly and willfully' committed refers only to the concept that there be 'specific intent' to perform the act itself, that is, that the act or omission constituting a violation of law must have been deliberate, as contrasted with an act that is the result of mistake, inadvertence, or accident. This definition makes clear that, even in the criminal context, acts not involving moral turpitude or acts that are not inherently wrong need not be motivated by a wrongful or evil purpose in order to satisfy the 'knowing and willful' requirement." See id. at 459.

In a later case, DiPrete v. Morsilli, 635 A.2d 1155 (R.I. 1994), the Court expounded on Carmody and held:

> 'that when a violation of the statute is reasonable and made in good faith, it must be shown that the official 'either knew or showed reckless disregard for the question of whether the conduct was prohibited by [the] statute * * * Consequently an official may escape liability when he or she acts in accordance with reason and in good faith. We have observed, however, that it is 'difficult to conceive of a violation that could be reasonable and in

by this Department would subject the Office to civil fines. At the end of this time period, we will issue our supplemental finding on this matter and determine whether civil fines are appropriate. Because of this Department's determination concerning Access/Rhode Island's lack of standing, and our determination that the Attorney General is pursuing this matter based upon our independent statutory authority set forth in R.I. Gen. Laws § 38-2-8(d), we are closing this file with respect to Access/Rhode Island, but this file remains open with respect to the Attorney General's independent statutory review as discussed, supra. Whether Access/Rhode Island would have standing to file a lawsuit is, of course, a decision within the jurisdiction of the Superior Court and not this Department

We thank you for your interest in keeping government open and accountable to the public.

Very truly yours,

Lisa Pinsonneault
Special Assistant Attorney General

Cc: Paul Ragosta, Esquire

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good faith. In contrast, when the violative conduct is not reasonable, it must be shown that the official was 'cognizant of an appreciable possibility that he [might] be subject to the statutory requirements and [he] failed to take steps reasonably calculated to resolve the doubt.'" (internal citations omitted). Id. at 1164. (Emphasis added).